

BEFORE THE FEDERAL ELECTION COMMISSION

2014 SEP 24 AM 10:43

In the Matter of

Massa for Congress and Beverly Massa, in her  
official capacity as treasurer  
Eric Massa  
Joseph Racialto

MUR 6275

CELA

SECOND GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

- (1) Take no further action as to Massa for Congress and Beverly Massa in her official capacity as treasurer, concerning the alleged violation of 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).<sup>1</sup>
- (2) Dismiss the allegation that Massa for Congress and Beverly Massa, in her official capacity as treasurer, or Eric Massa violated 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b)).
- (3) Dismiss the allegation that Joseph Racialto violated 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b)).
- (4) Approve the attached factual and legal analyses.
- (5) Approve the appropriate letters.
- (6) Close the file.

II. BACKGROUND

This matter involves allegations that former Congressman Eric Massa, his campaign committee, Massa for Congress (the "Committee"), and Joseph Racialto, Massa's Congressional Chief of Staff, violated the Act in connection with a \$40,000 payment from the Committee to Racialto on March 4, 2010, for a "campaign management fee." Because that payment may have related to an unreported deferred compensation arrangement, the Commission found reason to

<sup>1</sup> On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

1 believe that the Committee violated 52 U.S.C. § 30104 (formerly 2 U.S.C. § 434(b)) by failing to  
2 report debts and obligations.<sup>2</sup> The Complaint also asserted that Racalto either may not have  
3 performed sufficient work to justify the amount of the payment or had "obtained [the payment]  
4 through deceit," in which case the Committee, Massa, or Racalto may have converted campaign  
5 funds to personal use in violation of 52 U.S.C. § 30114 (formerly 2 U.S.C. § 439a).<sup>3</sup> The  
6 Commission took no action concerning that allegation pending the results of an investigation into  
7 the "circumstances of the payment."<sup>4</sup>

8 The evidence obtained during the investigation indicates that Racalto conducted work on  
9 behalf of the Committee related to campaign activities for which he was entitled to some  
10 compensation, and the parties agree as to that much.<sup>5</sup> Whether the value of that work to the  
11 Committee reasonably supports the \$40,000 amount of the payment, however, is sharply

<sup>2</sup> See Certification, MUR 6275 (Dec. 28, 2010); Factual & Legal Analysis, MUR 6275 (Massa for Congress) ("F&LA").

<sup>3</sup> Compl. at 7. Regarding the payment to Racalto, allegations that Rep. Massa may have sexually harassed members of his staff, including Racalto, were the subject of a House Ethics Committee investigation but a final report on that investigation was never issued. See Statement of the Chairman and Ranking Member Regarding Former Representative Eric Massa (July 15, 2011), <http://ethics.house.gov/press-release/statement-chairman-and-ranking-member-regarding-former-representative-eric-massa>; *House, Feds Open Massa Investigation*, ASSOC. PRESS (Apr. 21, 2010), <http://www.nbcnews.com/id/36692365/>; Carol Leonnig, *Massa Gave \$40,000 to Aide Before Resigning as Congressman*, WASH. POST (Apr. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/16/AR2010041603982.html>. On March 5, 2010, Rep. Massa formally resigned from Congress effective March 8, 2010. See Stephanie Condon, *Rep. Eric Massa Resigns, Takes Responsibility for Harassment Charges*, CBS NEWS (Mar. 5, 2010), [http://www.cbsnews.com/8301-503544\\_162-6270838-503544.html](http://www.cbsnews.com/8301-503544_162-6270838-503544.html).

<sup>4</sup> See Certification ¶ 2; First Gen. Counsel's Rpt. at 7. The Complaint also alleged that a \$31,896.42 payment to GMAC on March 4, 2010, for the lease of a campaign vehicle the day after Rep. Massa announced his retirement may have violated the Act's personal use prohibition. Compl. at 5. The Commission was equally divided as to whether to find reason to believe the Committee and Eric Massa violated 2 U.S.C. § 439a(b) in connection with that payment. See Certification (Nov. 19, 2010).

<sup>5</sup> The amount the Committee should pay to Racalto is currently the subject of a pending civil suit between the parties. See *Massa for Congress v. Joseph Racalto*, No. 11-1690CV (N.Y. Sup. Ct. Mar. 4, 2011) (complaint originally filed in Monroe County on Mar. 4, 2011, but venue changed to Steuben County on Nov. 28, 2011).

1 disputed and not readily ascertainable from the available evidence. The investigation determined  
2 there was no written deferred compensation plan between Rcalto and the Committee for his  
3 campaign work. And whether an oral agreement existed is a point of conflict among the  
4 Respondents, although the evidence reflects that the parties discussed at least the possibility of  
5 compensation shortly before Rcalto sought payment.

6 Thus, given the lack of substantial evidence that the Committee agreed to pay Rcalto  
7 before March 2010, there is no basis to conclude that the Committee had incurred a debt that it  
8 may have been required to disclose before it received the demand for payment. Moreover,  
9 because it appears that Rcalto performed much of the work that would have been the subject of  
10 the Committee's payment during the same reporting period in which he made his demand and  
11 the Committee issued that payment, no reportable debt would have been incurred as to that work.  
12 We therefore recommend that the Commission take no further action with regard to the  
13 Committee's alleged violation of 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).

14 As to the allegation that the Committee's \$40,000 payment to Rcalto constituted  
15 impermissible personal use of campaign funds — either because it was excessive or obtained  
16 through false pretenses — the available evidence suggests that the payment compensated Rcalto  
17 at least in part for work provided in connection with Rep. Massa's election campaign. Given the  
18 wide latitude vested in committees and candidates to retain services and compensate staff within  
19 commercially reasonable bounds and the difficulty of discerning on this record what would have  
20 constituted a reasonable amount of compensation, we recommend that the Commission dismiss  
21 the allegation that the Committee, Rep. Massa, or Rcalto violated 52 U.S.C. § 30114(b)  
22 (formerly 2 U.S.C. § 439a(b)), and close the file.

1    **III.    RESULTS OF INVESTIGATION**

2            In assessing the nature of the \$40,000 payment to Racalto, we sought evidence  
3    concerning the substance of Racalto's work for the Committee, whether an oral or written  
4    agreement existed regarding payment for that work, and the manner in which Racalto obtained  
5    authorization from officials for the Committee to issue the payment. We engaged in formal  
6    document discovery, including the review of a substantial volume of campaign documents, and  
7    interviewed numerous witnesses, including Racalto, Eric and Beverly Massa, the Committee's  
8    assistant treasurer, Vicki Winpisinger, who issued the payment to Racalto, and Neil Reiff, the  
9    Committee's former counsel.

10           **A.    The Extent and Value of Racalto's Campaign Work**

11           The witnesses interviewed in this matter generally agree that Racalto provided some  
12    campaign-related services to the Committee. They disagree, however, about the amount and  
13    materiality of that work. The extensive documentary record we compiled relating to the services  
14    Racalto provided demonstrates that Racalto participated in some campaign activities between  
15    September 2009 through March 2010, but primarily in early 2010. That evidence, however, does  
16    not resolve whether the volume or substance of his services justified the \$40,000 amount of the  
17    payment he received supposedly as compensation for those efforts.

18           We interviewed Racalto in connection with the nature of the work he provided the  
19    Committee and his demand for payment in the amount of \$40,000. He stated that he began his  
20    work for Massa and the Committee in the Fall of 2008.<sup>6</sup> He served the congressional office as

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<sup>6</sup> Report of Investigation of Joseph Racalto at 1 (Jun. 9, 2011) ("Racalto ROI"); *see also* Racalto Discovery Resp., Attach. at JAR-FEC-0533, 0551 to 0658 (Mar. 8, 2011) ("Racalto Docs.") (providing e-mails dated after the November 2008 General Election discussing staffing the new congressional office, office space, and salaries).

1 Chief of Staff, while providing additional services to the Committee as needed. He stated that  
2 while employed in the congressional office, he also spent approximately 30% of his time engaged  
3 in work related to the campaign efforts of the Committee and claimed that he was a "stickler" for  
4 separating the work he did in his two roles.<sup>7</sup>

5 Racalto claims that he was owed the \$40,000 the Committee paid him. As support for the  
6 legitimacy of the Committee's payment to him for campaign-related services, Racalto provided us  
7 with over 800 campaign-related e-mails, voice mails, and text messages that he participated in,  
8 which he claims document the campaign events, meetings, and strategy sessions in which he  
9 provided services to the Committee.<sup>8</sup> Most of the e-mails span an eight-month period, from  
10 September 2009 to April 2010, and consist of communications between Racalto and various  
11 campaign workers regarding fundraisers, campaign website design, and general campaign  
12 activities.<sup>9</sup>

13 In many of the e-mails Racalto was merely being copied to be kept informed.<sup>10</sup>  
14 Nonetheless, other documents suggest that Racalto engaged more actively in the campaign-related  
15 work of the Committee. For instance, there are messages showing that Racalto was personally  
16 involved in handling Rep. Massa's major donors,<sup>11</sup> that he approved the costs and contents of a

<sup>7</sup> Racalto ROI at 1.

<sup>8</sup> See Racalto Resp., Ex. A (May 24, 2010); Racalto Doc., Attach. at JAR-FEC-0029 to -0871 (Mar. 8, 2011).

<sup>9</sup> See e.g., Racalto Resp., Ex. A at JAR-FEC-0001, 0002, 0004, 0005, 0011 to -0026; Racalto Doc., Attach. at JAR-FEC-0105, 0111, 0115, 0123, 0131, 0134, 0135, 0137, 0145, 0158, 0173, 0183-0184, 0200, 0212 to -0215, 0217, 0225, 0227, 0230, 0231, 0240, 0251, 0253, 0254, 0267, 0281, 0300, 0316, 0356, 0387, 0413, 0418, 0533, 0788 to -0817, 0834.

<sup>10</sup> See, e.g., Racalto Resp., Ex. A at JAR-FEC-0003; Racalto Doc., Attach. at JAR-FEC-0136, 0689 to -0690, 0717.

<sup>11</sup> Racalto Doc., Attach. at JAR-FEC-0300.

1 campaign mailer,<sup>12</sup> that he directed payments to campaign vendors,<sup>13</sup> and that some campaign  
2 vendors and staff sought his guidance or decisions concerning a campaign activity.<sup>14</sup> In other  
3 messages, he offers advice regarding the campaign website and the contents of a fundraiser piece,  
4 seeks endorsements for Massa, conducts voter outreach efforts, discusses fundraising goals and  
5 logistics for fundraising events, and offers input into campaign strategy.<sup>15</sup> Racialto apparently also  
6 helped organize campaign events in various locations, including Boston, New York, and San  
7 Francisco.<sup>16</sup> In some instances, he directed payments to campaign vendors and was reimbursed for  
8 certain campaign travel expenses, further suggesting a substantive role with the Committee.<sup>17</sup>  
9 Finally, Racialto assisted in terminating the Committee's activities in March 2010, and gave  
10 instructions and opinions in e-mails concerning the payment of severance to campaign employees,  
11 campaign vendor debt settlement, and other "winding down" operations.<sup>18</sup>

12 Notwithstanding Racialto's interview statements and these records, other witnesses state  
13 that Racialto was not significantly involved in campaign activities. Beverly Massa — the spouse of  
14 Rep. Massa and treasurer for the Committee since 2005 — asserted that Racialto had no significant  
15 role with respect to the 2010 campaign and disagreed with Racialto's claim that he performed

<sup>12</sup> *Id.* at JAR-FEC-0253.

<sup>13</sup> *Id.* at JAR-FEC-0173, 0212 to -0213; Racialto Resp., Ex. A at JAR-FEC-0011.

<sup>14</sup> Racialto Doc., Attach. at JAR-FEC-0137, 0158, 0837. In one message an individual refers to refers Racialto as his "boss," but it appears that this individual may have also worked at the congressional office at some point. *Id.* at JAR-FEC-0096, 0129.

<sup>15</sup> Racialto Doc., Attach. at JAR-FEC-0106 to -0107, 0131, 0134 to -0135, 0183, 0225 to 0230, 0251, 0282, 0356, 0387; *see also id.* at JAR-FEC-105, 0111, 0115, 0123, 0254, 0281, 0316, 0356, 0413, 0418, 0788 to -0817, 0834 (discussing fundraising goals and events).

<sup>16</sup> *Id.* at JAR-FEC-0131, -0135, -0251, -0254, -0281, -0788 to -0817.

<sup>17</sup> *Id.* at JAR-FEC-0153, -0173, -0212.

<sup>18</sup> *Id.* at JAR-FEC-0060 to -0061, -0217, -0710.

1 significant campaign duties.<sup>19</sup> She explained that she was closely involved in the campaign's  
2 activities and related human resources issues and said that there was no contractual agreement  
3 between Racalto and the Committee.<sup>20</sup> She further noted that all Committee staffers and  
4 contractors were engaged through written contracts and executed confidentiality agreements, while  
5 Racalto had neither. Moreover, she observed that Racalto was not included among a list of  
6 salaried campaign employees and non-salaried consultants in a memorandum prepared in  
7 connection with the Committee's winding-down of operations.<sup>21</sup> In an affidavit she submitted to  
8 the Commission, Beverly Massa further averred that Racalto only attended and spoke at two 90-  
9 minute meetings on behalf of the campaign, and that he did not attend campaign staff meetings.<sup>22</sup>

10 Testimony from Neil Reiff, the Committee's counsel, and Vicki Winpisinger, the  
11 Committee's assistant treasurer, tend to corroborate Beverly Massa's view. Reiff indicates that  
12 prior to March 2010, he had only met Racalto once and had never worked with him before.<sup>23</sup> He  
13 did not know what Racalto did for the campaign, and explained that most of the time when he  
14 contacted Massa's office he dealt with Eric or Beverly Massa directly.<sup>24</sup> Similarly, Winpisinger

<sup>19</sup> Report of Investigation of Beverly Massa at 2 (Jul. 13, 2011) ("B. Massa ROI").

<sup>20</sup> Comm. Discovery Resp. (Mar. 1, 2011), Beverly Massa Aff. ¶ 1.

<sup>21</sup> Racalto Doc., Attach. at JAR-FEC-0082. The memorandum, prepared by Winpisinger and forwarded to Racalto, also discussed what to do with the campaign's primary and general election contributions, and how to handle the remaining expenses, including money owed to employees and contractors. In another document listing campaign contacts, Racalto was likewise not included on the list. *Id.* at JAR-FEC-0187 to -0188.

<sup>22</sup> See Comm. Discovery Resp., Beverly Massa Aff. ¶ 1; B. Massa ROI at 2.

<sup>23</sup> Report of Investigation of Neil Reiff at 2 (May 29, 2014) ("Reiff ROI").

<sup>24</sup> *Id.* Although in his interview, Reiff noted that when Racalto made his request for compensation he asserted that he had participated in campaign events and meetings.

1 did not know what Rcalto did for the campaign.<sup>25</sup> She explained that, with the exception of some  
2 e-mails, she had no prior contact with Rcalto before he called to obtain the \$40,000 payment.<sup>26</sup>  
3 She also did not recall ever paying Rcalto for any campaign work in the past.<sup>27</sup>

4 We also interviewed former Rep. Massa. He stated that Rcalto was never assigned  
5 campaign work, although he acknowledged that Rcalto performed minimal campaign activities in  
6 connection with his role as the Chief of Staff for Massa's congressional office.<sup>28</sup> Rep. Massa  
7 explained that Rcalto volunteered for the campaign and spent the last ten days of the 2008  
8 campaign traveling with Massa and his family as they campaigned.<sup>29</sup>

9 **B. The Alleged Oral Agreement Between the Candidate and Rcalto**

10 It is clear that the parties never entered into a written agreement to pay Rcalto for work  
11 he may have provided the Committee and it appears that Rcalto was not even considered an  
12 employee or consultant of the Committee. When interviewed, Rcalto did not claim any such  
13 written agreement existed; rather, he claimed that Rep. Massa orally agreed to compensate  
14 Rcalto for his campaign-related work, that the payment would be deferred, and that no specific  
15 rate of compensation was discussed.<sup>30</sup> According to Rcalto, on March 3, 2010 — the same day  
16 that Rep. Massa announced his retirement — Rep. Massa agreed during a later conference call

<sup>25</sup> Report of Investigation of Vickie Winpisinger at 1 ("Winpisinger ROI").

<sup>26</sup> Winpisinger ROI at 1.

<sup>27</sup> *Id.* at 2. Winpisinger was the campaign's accountant and was responsible for writing checks on the campaign's account to pay vendors and payroll. *Id.* at 1.

<sup>28</sup> Report of Investigation of Eric Massa at 1-2 (Jul. 13, 2011) ("E. Massa ROI").

<sup>29</sup> *Id.* at 1.

<sup>30</sup> Rcalto ROI at 1.



1 that the Committee would pay Rcalto \$40,000 for his assistance to the campaign.<sup>31</sup> Rcalto  
2 acknowledges, however, that that decision was never reduced to writing.<sup>32</sup>

3 Other witnesses offer differing recollections. Rep. Massa stated that he and Rcalto had  
4 an unwritten salary agreement between them for his work as Massa's congressional Chief of  
5 Staff, but he claims that the first and only conversation he recalls having with Rcalto concerning  
6 compensation for campaign work took place on March 3, 2010, following a press conference in  
7 which he announced his retirement from Congress.<sup>33</sup> Although Rep. Massa's recollection is  
8 consistent with Rcalto as to the fact and timing of a discussion about campaign-related  
9 payments, Rep. Massa asserts that that he did not agree to anything at that time, including an  
10 amount of payment.<sup>34</sup>

11 The Committee's counsel, Reiff, provided information in connection with our  
12 investigation as well. He states that he was present for the conversation between Rcalto and  
13 Rep. Massa after the press conference. He asserts that Rcalto's request for payment appeared to  
14 him to come "out of left field."<sup>35</sup> Reiff recalls that Rep. Massa directed Rcalto to speak with the  
15 lawyers about payment, and that Rcalto then explained to Reiff (and his co-counsel, Joseph  
16 Sandler) Rcalto's plans for winding down the campaign (for which he wanted to be paid).<sup>36</sup> To

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<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 3. Although Rcalto mentioned the existence of a contract in an e-mail he sent to Vicki Winpisinger, Rcalto Doc., Attach. at JAR-FEC-0222, as noted, we have obtained no written document memorializing any agreement concerning the payment to Rcalto, and all parties including Rcalto assert no such writing exists.

<sup>33</sup> E. Massa ROI at 1.

<sup>34</sup> *Id.*

<sup>35</sup> Reiff ROI at 1.

<sup>36</sup> *Id.* at 1, 3.

1 further justify his entitlement to some compensation, Racalto listed certain campaign events that  
2 he had attended, but Reiff insisted that the request for payment would have to be documented.<sup>37</sup>  
3 Reiff did not recall coming to any agreement with Racalto concerning his request for payment at  
4 that time or its amount, and recalls that the only other time he spoke with Racalto that weekend  
5 they did not discuss compensation at all.<sup>38</sup>

6 For her part, Beverly Massa recalls speaking to Racalto multiple times by phone on  
7 March 3, 2010, but states that there was no discussion regarding possible compensation during  
8 any of those phone calls.<sup>39</sup>

9 Records reflect that the next day, March 4, 2010, Racalto first called and then e-mailed  
10 Vickie Winpisinger requesting the \$40,000 payment as a "consulting fee," and sent an e-mail to  
11 Reiff containing an invoice for his consulting services.<sup>40</sup> In his call and e-mail to Winpisinger,  
12 Racalto emphasizes the need for the payment because he was getting his braces removed and  
13 claimed that Rep. Massa had approved the \$40,000 payment.<sup>41</sup> The invoice Racalto provided to  
14 the Committee sought \$40,000 for his work in connection with campaign activities through  
15 March 4, 2010 and prospectively for work to be provided until December 2010. The invoice was  
16 submitted as an e-mail to Reiff, stating:

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<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.* at 4.

<sup>39</sup> B. Massa ROI at 2.

<sup>40</sup> See Racalto Doc., Attach. at JAR-FEC-0222. Racalto's e-mail appears to be in response to a memorandum Winpisinger sent on the subject of closing of the campaign. *Id.* at JAR-FEC-0081 to -0082.

<sup>41</sup> Racalto Doc., Attach. at JAR-FEC-0222; Winpisinger ROI at 1. Racalto apparently mentioned approval of the payment to Dorothy Drazal, the Committee's political director, as well. In a March 4, 2010, text message to Racalto, Drazal lists a number of action items that she had discussed with Reiff and included the payment to Racalto as one of them. Specifically, the text states that she would "ask Vickie to do the \$40K to you and Bev gives her written approval." Racalto Doc., Attach. at JAR-FEC-0032.

Invoice for Joe Racialto

Consulting fee (\$30,000 election cycle)  
Liason between NY and Washington  
Managed fundraiser and staffing for Massa for Congress

March, 4, 2010 – December 2010 (\$10,000)  
Manage final disbursement of campaign fund and close campaign

Total: \$40,000.<sup>42</sup>

In response to a question from Reiff, Racialto stated in an e-mail that his "consulting fee" included work from January 1, 2009 through March 3, 2010.<sup>43</sup> The invoice also included a \$10,000 demand relating to future work to close the campaign between March 2010 and December 2010. In response to our questions concerning that component of the invoice, Racialto acknowledged that he resigned well before December 2010 and that the Committee's counsel had already taken over campaign duties after Eric Massa's resignation.<sup>44</sup> Rep. Massa also indicated that he had no contact with Racialto after March 8, 2010.<sup>45</sup>

**C. The Authorization to Pay Racialto \$40,000 in Committee Funds**

Rep. Massa claims that he was upset and angry when he learned that Racialto had been paid \$40,000, an amount he said was never agreed upon or authorized by him.<sup>46</sup> In contrast to Racialto's interview statements, Rep. Massa stated that the specific amount of \$40,000 had never

<sup>43</sup> *Id.* at JAR-FEC-0055. Racialto indicated to us that the Committee hired a campaign manager in mid-2009, but that he continued to be involved in all aspects of the campaign. Racialto ROI at 1.

<sup>44</sup> Racialto ROI at 3; Racialto Doc., Attach. at JAR-FEC-0057.

<sup>45</sup> E. Massa ROI at 2.

<sup>46</sup> E. Massa ROI at 2; Reiff ROI at 2.

1 been discussed between them and asserted that Racialto lied about Massa agreeing to the payment  
2 in order to induce authorization of the payment.<sup>47</sup>

3 Winpisinger told us that she felt uneasy about the payment to Racialto and contacted Reiff  
4 for approval of the disbursement, telling counsel that as long as he signed off on the payment to  
5 Racialto, she "would do what [she was] told."<sup>48</sup> Reiff responded to Winpisinger via e-mail,  
6 stating, "Yes, I am aware of all this, thanks."<sup>49</sup> Reiff explained that when he spoke with  
7 Winpisinger he was busy at a speaking engagement and his only focus was on the legality of the  
8 payment — *i.e.*, whether the payment was a permissible campaign use or an illegal personal use  
9 of funds.<sup>50</sup> Because the payment was ostensibly for past campaign work and future wind-down,  
10 he concluded it was permissible and assented to the payment. At the time, Reiff thought he was  
11 being consulted for the limited question of the payment's legality under the Act and did not  
12 realize that his assent was apparently being considered as the final word on whether to make the  
13 payment and in what amount. Reiff claims that Racialto "seemed to be working in Eric's  
14 interests" so it did not occur to him that Racialto may have been taking advantage of the chaos in  
15 the campaign. Reiff states that Winpisinger told him that Racialto needed the payment soon to  
16 pay to get his braces taken off and that Rep. Massa had approved the payment.<sup>51</sup> Reiff also notes

<sup>47</sup> E. Massa ROI at 2. Reiff recalled a phone call that he received from Rep. Massa on Friday, March 5, 2010, during which Massa was angry about the payment, stating that Racialto "robbed him." Reiff ROI at 2.

<sup>48</sup> See Comm. Discovery Resp. at EJJM 010.

<sup>49</sup> See *id.* Subsequently, at Racialto's request in connection with communication with Racialto's credit union, Winpisinger confirmed in a March 30, 2010, e-mail that the \$40,000 payment was Racialto's compensation for work performed for the Committee. See Racialto Doc., Attach. at JAR-FEC-0049.

<sup>50</sup> Reiff ROI at 2.

<sup>51</sup> *Id.*

1 that the amount of the payment was not out of the ordinary, and he had no reason to question the  
2 payment for that reason.<sup>52</sup>

3 Winpisinger explained to us that she was required to get approval from Committee  
4 treasurer Beverly Massa for every check written with the exception of payroll checks.<sup>53</sup> In  
5 addition, the Committee did not maintain a significant balance in the disbursement account that  
6 Winpisinger could access, thus requiring Winpisinger to request that Beverly Massa transfer  
7 funds into the account when she needed to make a disbursement.<sup>54</sup> To effect the payment to  
8 Rcalto, Winpisinger e-mailed Beverly Massa on March 4, 2010, and asked her to transfer funds  
9 into the account because "Joe Rcalto has asked me to send him a check for \$40,000."<sup>55</sup>  
10 Beverly Massa then transferred the money and Winpisinger disbursed the check to Rcalto on  
11 March 4, 2010.<sup>56</sup>

12 Beverly Massa also indicated that Rcalto never discussed compensation with her during  
13 multiple phone calls they had on March 3, after her husband announced his retirement.<sup>57</sup> We  
14 questioned Beverly Massa about her role in authorizing the disbursement. She acknowledged that  
15 she transferred the funds into the account when Winpisinger asked her to, but claimed that she did  
16 not focus on the stated reason for the request because she was distracted by the circumstances of

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<sup>52</sup> *Id.*

<sup>53</sup> Winpisinger ROI at 1.

<sup>54</sup> *Id.* at 1.

<sup>55</sup> See Comm. Disc. Resp. at EJJM 003.

<sup>56</sup> The check, dated March 4, 2010, contains no notation suggesting its purpose. See Rcalto Doc., Attach. at JAR-FEC-0203.

<sup>57</sup> B. Massa ROI at 2.

1 Massa's sudden retirement announcement.<sup>58</sup> She assumed Winpisinger was requesting the money  
2 in connection with winding down the campaign, since the requested amount itself was not  
3 extraordinary.<sup>59</sup> Beverly Massa conceded that she reviewed the e-mail from Winpisinger that  
4 stated that the transfer related to a \$40,000 payment to Rcalto, but asserted that she understood  
5 that to mean only that Rcalto had requested a check for \$40,000, as neither Winpisinger nor  
6 Rcalto informed her of its purpose — that is, to compensate Rcalto himself for assistance he  
7 claimed he had provided the Committee.<sup>60</sup>

8 **D. Subsequent Activity and Claims Concerning the Payment**

9 On the same day that Rcalto received his \$40,000 payment from the Committee, two  
10 members of Massa's campaign staff were offered "severance payments" — albeit in smaller  
11 amounts than Rcalto received, consisting of one and four months' salary and health insurance  
12 coverage, respectively.<sup>61</sup> Reiff prepared the severance paperwork, drafts of which contained  
13 mutual releases and confidentiality agreements. Apparently the Committee sought to prepare the

<sup>58</sup> *Id.* Reiff explained that the Massas were in fact largely unavailable on March 3 and 4 as a result of the events, and then the following week Beverly Massa accompanied Rep. Massa on a week of public appearances to deal with the fallout of his resignation. Reiff ROI at 3.

<sup>59</sup> B. Massa ROI at 2.

<sup>60</sup> Comm. Discovery Resp. at EJJM 003. Rep. Massa was unavailable on March 4 — the day after his resignation — as he was "physically and mentally exhausted." *Id.* at EJJM 001; Rcalto Doc., Attach. at JAR-FEC-0047. During that absence, Rep. Massa "directed that all questions for his consideration be referred to counsel for later discussion and resolution." Comm. Discovery Resp. at EJJM 001. Nonetheless, Rcalto "pressured" Winpisinger during the afternoon of March 4 to issue the payment to him "because of certain personal bills that he, Mr. Rcalto, needed to pay." *Id.* According to Reiff, Rcalto claimed that he needed the funds to pay to get his braces taken off. Reiff ROI at 2.

<sup>61</sup> *Id.* at JAR-FEC-0060 to -62. In one of the e-mails concerning these severances, Drahzal expressed concern that the individual receiving 4 months' severance had worked for the campaign only 60 days, but the payment was made because Rep. Massa had directed it. *Id.* The recipients of those payments apparently were required to sign agreements that Reiff drafted imposing certain obligations on them, including the requirement that the severed staff return any campaign materials to the Committee. *Id.* Rcalto did not sign any such agreement.

1 agreements quickly: in an e-mail exchange with Drahzal, Winpisinger, and Racialto, Reiff  
2 explained that he "whipped these up in a rush."<sup>62</sup> Those e-mail exchanges further reflect that  
3 Racialto was among the group that determined the amount and conditions relating to these  
4 severances.<sup>63</sup>

5 The parties have described the purpose of the payment to Racialto differently over time.  
6 Following the issuance of the payment to Racialto, in a March 15, 2010, letter to the Clerk of the  
7 U.S. House of Representatives, Racialto described the compensation as "severance."<sup>64</sup> On  
8 March 30, 2010, Winpisinger received an inquiry apparently related to a mortgage application  
9 Racialto had made with a financial institution, and stated that the payment to Racialto was  
10 "compensation."<sup>65</sup> The first documented indication that the Committee disputed the legitimacy  
11 of the payment followed news reports relating to the Committee's disclosure of the payment in  
12 its 2010 April Quarterly Report, filed April 15, 2010. On April 19, 2010, counsel for the  
13 Committee sent Racialto a letter in which it demanded that Racialto return the full \$40,000  
14 payment, asserting that the public interest generated by the filing, caused the Committee to  
15 "review[] its internal records and documentation relating to that payment."<sup>66</sup>

16 In response to our discovery requests, the Committee and Rep. Massa have acknowledged  
17 that Racialto was "entitled to some amount of payment for services to the campaign."<sup>67</sup> The

<sup>62</sup> *Id.* at JAR-FEC-0060, 0700 to -0709.

<sup>63</sup> *Id.*

<sup>64</sup> B. Massa ROI at 3; Racialto Doc., Attach. at JAR-FEC-042. In his letter to the Clerk, Racialto requests a salary decrease based on the \$40,000 "severance" in order to comply with the Speakers Pay Cap. *Id.*

<sup>65</sup> Racialto Doc., Attach. at JAR-FEC-049.

<sup>66</sup> *Id.* at JAR-FEC-0047.

<sup>67</sup> Comm. Discovery Resp., B. Massa Aff. at 1.

1 Committee nonetheless denies that it owed Racialto \$40,000 and claims that the payment was not  
2 properly authorized.<sup>68</sup> Beverly Massa alleges in a sworn statement that Racialto "embezzled" the  
3 \$40,000.<sup>69</sup> In his interview with us, Reiff stated that he believed that they "were all played."<sup>70</sup>

4 As noted, after the payment became the subject of media attention and the Committee's  
5 demand that Racialto return the funds failed, the Committee filed suit against Racialto in New York  
6 state court. The Committee's civil complaint alleges that Racialto fraudulently obtained \$40,000  
7 from the Committee through misrepresentations and thereby was unjustly enriched and wrongfully  
8 converted the Committee's funds. The lawsuit survived Racialto's motion to dismiss filed August  
9 2011, but no public activity has occurred in connection with the action since it entered the  
10 discovery stage.<sup>71</sup>

#### 11 IV. ANALYSIS

12 The Act provides that each treasurer of a political committee must file reports of receipts  
13 and disbursements disclosing the amount and nature of any outstanding debts or obligations the  
14 committee owes or is owed.<sup>72</sup> Any such debts or obligations must continuously be reported until

<sup>68</sup> See *id.* at 2; E. Massa ROI at 2.

<sup>69</sup> See *id.*, Comm. Resp. Beverly Massa Aff. at 2-3.

<sup>70</sup> Reiff ROI at 3.

<sup>71</sup> *Massa for Congress v. Joseph Racialto*, Decision and Order, No. 2011-1690CV (N.Y. Sup. Ct. Monroe Cnty) (denying motion to dismiss); see Andrew Poole, *Massa-Racialto Going to Trial*, EVENING TRIB. (Aug. 5, 2011), <http://www.eveningtribune.com/features/x919513577/Massa-Racialto-going-to-trial>. On October 24, 2013, this Office confirmed with the Clerk of Court that no new filings or developments had occurred since the motion to dismiss was denied.

<sup>72</sup> 52 U.S.C. § 30104(b)(8) (formerly 2 U.S.C. § 434(b)(8)); 11 C.F.R. § 104.3(b).



1 extinguished.<sup>73</sup> If the exact amount of a debt or obligation is unknown, the committee should  
2 report an approximate amount and state that the amount reported is an estimate.<sup>74</sup>

3 It is uncontested here that no written agreement concerning Rcalto's work for the  
4 Committee was executed. Moreover, we were unable to confirm that the Committee and Rcalto  
5 entered into either an oral agreement to compensate him for work he provided the Committee, to  
6 a specific amount of any such compensation, or whether to defer his compensation to a later date.  
7 Rcalto has not produced any document or other information to support his claim that there was  
8 an agreement that he was to be paid at a later date for his services to the Committee and admits  
9 that a written agreement does not exist. The Massas deny that there was any agreement, oral or  
10 written, and other witnesses, including Reiff and Winpisinger, state that they were unaware of  
11 any work Rcalto may have done for the campaign or the existence of any agreement to pay him  
12 for campaign work. Because we are aware of no affirmative evidence indicating the existence of  
13 a prior agreement, deferred compensation arrangement, or even a demand for payment prior to  
14 the reporting period in which the payment was tendered to Rcalto, we conclude that the  
15 Committee did not fail to report a pre-existing debt on its relevant disclosure reports,

16 Nonetheless, the parties themselves generally agree that Rcalto was entitled to some  
17 compensation for his work for the Committee, although the amount remains disputed. The  
18 record currently before the Commission suggests that almost all of Rcalto's demonstrable  
19 campaign-related work occurred during the same April quarterly reporting period in which the

<sup>73</sup> 52 U.S.C. § 30104(b)(8) (formerly 2 U.S.C. § 434(b)(8)); 11 C.F.R. § 104.11(a).

<sup>74</sup> 11 C.F.R. § 104.11(b). If a committee does not pay an employee for services rendered "in accordance with an employment contract or a formal or informal agreement to do so," the unpaid amount either may be treated as a debt owed by the committee to the employee, or — if the employee signs a written statement agreeing to be considered a volunteer — converted to a volunteer services arrangement under 11 C.F.R. § 100.74. *See id.* § 116.6(a).

1 demand and payment were made — that is, between January 1, 2010, and March 31, 2010. If so,  
2 there would have been no substantial debt to report prior to that reporting period. Moreover,  
3 even if the payment were characterized not as compensation but as severance — similar to the  
4 payments other campaign staffers received at the same time — such a payment would not  
5 constitute a debt that should have been reported in an earlier disclosure report. We therefore  
6 recommend that the Commission take no further action as to the Committee for failing to report  
7 unpaid salary as a debt under 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).

8 The Complaint also alleges that the Committee's \$40,000 payment to Rcalto amounted  
9 to an impermissible personal use of campaign funds in violation of 52 U.S.C. § 30114 (formerly  
10 2 U.S.C. § 439a). An expenditure becomes the "personal use" of campaign funds only when a  
11 present or former candidate uses campaign funds to fulfill a commitment, obligation, or expense  
12 of a person that would exist "irrespective of" the candidate's election or individual duties as a  
13 holder of federal office.<sup>75</sup> Candidates and committees nonetheless enjoy wide latitude to use  
14 campaign funds for lawful purposes, including employing staff, compensating individuals for  
15 their services, and paying incidental expenses.<sup>76</sup>

16 The Complaint suggests that the payment to Rcalto may have been made as an  
17 inducement to silence his harassment claims against Rep. Massa, an allegation premised on the  
18 amount and timing of the payment. Our investigation, however, failed to uncover any  
19 evidentiary basis to infer that the payment was made for a personal or unlawful purpose, beyond

<sup>75</sup> 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b)).

<sup>76</sup> See *id.* § 30114(a) (formerly 2 U.S.C. § 439a(a)); MUR 5701 (Filner) (Commission found no personal use violation where committee funds were used to pay a consultant fair market value for *bona fide* services); Advisory Op. 1993-06 (Citizens for Congressman Panetta) (Committee funds may be used for, among other things, salaries of those hired to prepare and file disclosure reports with the Commission); Advisory Op. 1978-43 (Congresswoman Barbara Jordan) (Committee funds may be expended to employ staff and pay incidental expenses).

1 its timing and the fact of Rcalto's charges against Rep. Massa. Indeed, both the Committee and  
2 Rcalto agree that Rcalto provided some work for the Committee related to the campaign, and  
3 that he was due some amount of compensation in return. And notwithstanding the confusion  
4 within the Committee structure at the time of the candidate's resignation, the disbursement it  
5 issued was approved by Committee counsel, the treasurer, and the assistant treasurer, appears to  
6 have been issued at the same time that several former campaign employees were provided  
7 severance in relation to their work for the Committee, and we have uncovered no evidence  
8 suggesting that Rep. Massa or any official connected to the Committee sought to conceal the  
9 payment to Rcalto.

10 Given that record, we are unable to state conclusively that the payment to Rcalto was  
11 made to fulfill an obligation that existed "irrespective of" Rep. Massa's election campaign or  
12 duties as an officeholder.<sup>77</sup> And in view of the substantial latitude afforded candidates and  
13 committees to make disbursements for campaign-related services, coupled with the lack of  
14 substantial affirmative evidence that the payment was made for an unlawful purpose, we  
15 conclude that additional Commission action relating to the value of the services Rcalto provided  
16 the Committee — the subject of ongoing civil litigation between the parties and difficult to  
17 discern in any event — would be wasteful and unwarranted under the circumstances.<sup>78</sup>  
18 Accordingly, we recommend that the Commission dismiss the allegation that the Committee,  
19 Eric Massa, or Rcalto violated 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b)) in  
20 connection with the Committee's payment to Rcalto, and close the file.


<sup>77</sup> See 52 U.S.C. § 30114 (formerly 2 U.S.C. § 439a).


<sup>78</sup> See *Heckler v. Cheney*, 470 U.S. 821 (1985); Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (recognizing that dismissal may be warranted due to factors such as the "vagueness or weakness of the evidence").

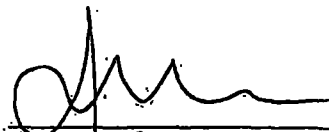
V. RECOMMENDATIONS

1. Take no further action as to Massa for Congress and Beverly Massa in her official capacity as treasurer, concerning the alleged violation of 52 U.S.C. § 30104 (formerly 2 U.S.C. § 434(b)).
2. Dismiss the allegation that Massa for Congress and Beverly Massa, in her official capacity as treasurer, or Eric Massa violated 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b)).
3. Dismiss the allegation that Joseph Racialto violated 52 U.S.C. § 30114(b) (formerly 2 U.S.C. § 439a(b)).
4. Approve the attached factual and legal analyses.
5. Approve the appropriate letters.
6. Close the file.

09/23/14  
Date

  
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